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IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLE

No. ..... 71 - 344

16,179 MOLSO ITALIAN .22 CALIBER WINLEE DERRINGER CONVERTIBLE STARTER GUNS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

GOODWIN LEE, doing business as WESTBURY SALES CO.,

Petitioner,

—against—

DAVID M. KENNEDY, as Secretary of the Treasury, RANDOLPH W. THROWER, as Commissioner of Internal Revenue, LESTER D. JOHNSON, as Commissioner of Customs, HAROLD A. SERR, as Director of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service of the Department of the Treasury, and JOHN L. PIPER, Chief, Enforcement Branch of the Internal Revenue Service of the Department of the Treasury,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Goodwin Lee, in his own behalf, and in behalf of 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 8, 1971 (Appendix A hereto, *infra*, p. 1a).

Opinions Below

In a judgment, entered in this case on June 30, 1970, and containing findings of fact and conclusions of law, the United States District Court for the Eastern District of New York, Bruchhausen, J. ordered that 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns (hereinafter "the Starter Guns") be condemned as forfeited to the Untied States" (Appendix B hereto, *infra,* p. .....). The text of the Court's opinion is contained within the judgment and is reported at 314 F. Supp. 179.

The United States Court of Appeals for the Second Circuit, in an opinion not yet reported, affirmed the above noted judgment of the District Court (Appendix A hereto, *infra,* p. 1a).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit, here sought to be reviewed, is dated June 8, 1971 (Appendix A hereto, *infra,* at p. 1a). This petition for certiorari is timely filed under the provisions of 28 U.S.C. § 2101(c) and Rule 34(1) of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

1. Was the Petitioner deprived of due process of law by virtue of the failure of the Department of the Treasury to specify any standards under which it would interpret 18 U.S.C. § 921(a), which defines a firearm as "any weapon, (including a starter gun) which . . . may readily be converted to expel a projectile by the action of an explosive."

2. Where the Government stands by for a period of three months, knowing that certain starter guns, due to a hidden defect, do not comply with the requirements of law, and the Petitioner imports a substantial quantity of such starter guns, during that period, without knowledge of the

hidden defect and in reliance upon the government's approval of non-defective guns, is the government estopped from demanding forfeiture of the guns? Must the government either permit the petitioner to remedy the defect or return the starter guns to the country of origin?

Constitutional Provisions and Statutes Involved

United States Constitution

Fifth Amendment

"No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

United States Code, Title 18, Chapter 44—Firearms

[Added Pub. L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233, and amended Pub. L. 90-618, Title I, §102, Oct. 22, 1968, 82 Stat. 1223]

§ *921—Definitions*

"(a) As used in this chapter—

* * * * *

"(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. * * * "

"§ *922—Unlawful acts*

"(a) It shall be unlawful—

"(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce; * * * "

"§ *923—Licensing*

"(a) No person shall engage in busines as a firearms or ammunition importer, manufacturer, or

dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation proscribe. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows:

* * * * *

"(2) If the applicant is an importer—

* * * * *

"(B) of firearms other than destructive devices or ammunition for firearms other than destructive devices, a fee of $50 per year. * * * "

"§ *924—Penalties*

"(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned for not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

* * * * *

"(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of forearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter."

§ 925 *Exceptions: Relief from Disabilities*

* * * * *

"The Secretary may permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.' '

§926. *Rules and Regulations*

"The Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter, including—

"(1) regulations providing that a person licensed with another person so licensed, shall provide such other licensed person a certified copy of this license; and

"(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection.

"The Secretary shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing such sules and regulations."

Statement of the Case

1. Pre-importation Negotiations and Precautions

The petitioner, Goodwin Lee, is an importer who does business under the name of Westbury Sales Co. In December, 1967, he met with representatives of the Molso Company in Como, Italy, and he contracted with them for

the design and manufacture of starter pistols to be sold in the United States (B. 26-27).*

One of the conditions of the agreement was that the starter pistols "should not be able to shoot live ammunition" (B. 32).

Starter pistols are used for sports and theatrical events and for other recreational purposes. The feature which differentiates a starter pistol from a firearm is the presence of a metal plug in the barrel of the starter pistol. A starter pistol can only be used to fire blank ammunition. If live ammunition were to be used, the starter pistol would explode due to the blocking effect of the metal plug. If the plug can successfully be drilled out, without destroying the remaining structure, a starter pistol is then able to fire ordinary ammunition (B. 120).

During the period that followed Lee's meeting with the Molso representatives, prototypes were forwarded to Lee and molds were created for the manufacture of the finished product (B. 27-28). During this same time, Congress had before it proposed legislation for the control of firearms. With this in mind, it was agreed between Lee and Molso that the finished models would be manufactured to comply with the anticipated law (B. 34, 36, 37).

2. Pre-importation Approval by Alcohol, Tax & Firearms Division

Eventually, Lee received samples of one of the starter pistols models, and he personally brought these to the

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* The following are used to designate citations to the proceedings in the District Court: "A"—Appellant's Appendix in the Court of Appeals, which contains the pleadings in the District Court; "B"—The first day of trial testimony (June 10, 1970); "C"—The second day of trial testimony (June 11, 1970). Each day's transcript was individually paginated.

Washington offices of the Alcohol, Tax & Firearms Division of the Internal Revenue Service [hereinafter, "ATF"] for approval and testing (B. 37-38).

Using a *hacksaw,* Paul Westenberger, a firearms enforcement office of ATF, was unable to cut completely through the metal plug in less than fifteen minutes (C. 55). Thereafter, by a letter, dated January 13, 1969, ATF advised Lee as follows concerning the starter pistol [identified as Model DA-1]:

> "After careful examination of the subject Derringer, it is the determination of this office that the device is not capable of expelling a projective as the result of the action of an explosive device and thus is not classified as a 'firearm' under the provisions of Section 921(a)(3) of Amended Chapter 55, Title 18 U.S.C. During the process of evaluation, the device was partially destroyed in determining the quality of the steel obstacle die-cast in the barrels" (Lee Exhibit 7A, in evidence, p. 839).

Thereafter, Lee received from Molso samples of two additional types of starter pistols [identified, respectively, as DA-3 and DA-4]. The samples were preceded by a letter, dated March 22, 1968, which advised that:

> "* * * According to our experience, the sample B [DA-4] should not be accepted by Washington offices as not difficult to drill and suitable to shoot. Sample A [DA-3] should be acceptable as impossible" [Lee Exhibit 8, in evidence, B. 45].

Lee brought these DA-3 and DA-4 models to ATF. By means of an *electric drill,* Westenberger was able to drill through the plug only after forty minutes, after disassembling the pistol (C. 57-59). By a letter dated May 8, 1969, the Director of ATF advised Lee that:

"After careful examination by personnel of the enforcement branch of this division, it has been determined that both the model DA-3 (steel rib variation) and the model DA-4 (die-cast rib variation) .22 calibre blank starter pistols are incapable of expelling a projectile by the action of an explosive and as such, are not classified as firearms under the provisions of Section 921(a)(3) of Amended Chapter 44, Title 18, U.S.C." (Lee Exhibit 16, in evidence, B. 53).

3. The Importation of the Starter Pistols

Subsequent to, and in reliance upon, the January 13, 1969 and May 8, 1969 letters of approval issued by the Director of ATF, Lee ordered and received substantial quantities of the DA-1 and the DA-4 models, and commenced marketing them (A. 5-7).

4. Subsequent Testing by ATF; The Lack of Notice

On August 15, 1969, David Wessler, an agent of ATF, purchased a DA-1 from one of the companies to which Lee is a supplier. He took it home, disassembled it, and commenced drilling a hole in the barrel. Wessler was able to drill out the plug in "less than fifteen [minutes]"* (B. 126-128). Up to this point, Lee had imported only one lot of starter pistols, and these were of the DA-1 variety (A. 16).

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* In its opinion, the Court of Appeals states that "Wessler was able to convert the gun to fire live ammunition within a few minutes." In fact, his testimony on this score, as to the drilling process, was: "Q. How long did it take you to do that? A. A few minutes, less than fifteen" (B. 128).

Not having received any notice that anything was amiss, Lee continued with his importation schedule as follows (A. 16):

Date of Importation	*Quantity*	*Type*
September 4, 1969	2,040	DA-4
September 30, 1969	3,900	DA-4
September 30, 1969	6,000	DA-1

On October 8, 1969, following Wessler's report as to the above, John Rowley, another special investigator of ATF, went to the company from which Wessler had purchased the DA-1. He examined the company's stock of DA-4 models, and came to the opinion that they were "readily convertible." However, he did not attempt to obtain one for testing purposes.

Still, not having received notice that anything was amiss, Lee continued with his importation schedule, as follows (A. 16):

Date	*Quantity*	*Type*
October 17, 1969	8,400	DA-4

At or about the same time that the above shipment arrived, Lee received a telephone call from the company which Wessler and Rowley had been visiting. The company advised Lee that Rowley had been to their office and that "he thought the guns were illegal" (B. 59). Although not having received any notice from ATF, and based solely upon this telephone call, Lee immediately attempted to stop further shipments from Italy. However, a shipment was already en route and the Italian company was not able to stop it (Lee Exhibit 20, in evidence, B. 58-60). At the time of trial, this shipment was in a bonded warehouse, and had not been made a part of this suit since Lee prevented them from formally entering the United States (B. 60).

On November 4, 1969, Wessler returned to that company again and obtained a DA-4. He brought it home and was able to drill out the barrel (B. 136-144). As to the length of time it took him to do this, he testified:

> "A. I didn't time it. But I would say five or six minutes. It took me longer to find a drill bit than to drill out the barrel.
>
> "Q. And having drilled out the barrel, would that make a clean hole from the muzzle of the gun through to the chamber of the gun? A. Well, I wouldn't call it a clean hole but it made a hole in the barrel from the chamber to the breach" (B. 144).

5. The First ATF Warning to Lee

It was not until November 6, 1969, that ATF advised Lee that the permits of January 13, 1969 (covering the DA-1) and May 8, 1969 (covering the DA-3 and DA-4) were being reassessed by ATF. This was done by means of a visit to Lee by Agent Rowley, who advised Lee that, despite the letters of approval, it appeared that DA-1 and DA-4 should be considered firearms under the gun control act. He obtained additional samples of each model from Lee and instructed Lee not to sell any more of his stock, pending further tests. Lee did not make any sales after that date (B. 146-148).

6. The Seizures

On December 8, 1969, Rowley returned to Lee's offices, advised him that ATF had concluded that the starter pistols were firearms under the law, and seized 15,952 starter pistols that Lee had in stock (B. 1531-154).

On December 17, 1969, Agent Westenberger (the person who had authorized the original letters of approval) received six of the seized starter pistols. He later attempted to convert four of them, with the following results:

1) He was able to drill through the plug of a DA-1 in an unspecified period of time, but the device would not fire a cartridge (C. 64);

2) He converted the barrels of a DA-4 in eight minutes, and was able to fire one cartridge. However, the cartridge casing expanded in the chamber walls, requiring disassembly before it would be able to fire another cartridge (C. 65);

3) He drilled out the two barrels of a DA-4 in six minutes, and it was able to fire a cartridge (C. 67);

4) He experienced difficulty converting a DA-1, but he was eventually able to do so in an unspecified period of time. After it fired one shell, cartridge expansion resulted in the same problem as that which had occurred with the second device (C. 68-69).

On December 22, 1969, Lee called Rowley and advised him that 237 more of the starter pistols had been released by United States Customs. Rowley thereupon went to Lee's premises and seized this latter group (B. 154-155). The total of these two seizures, 16,179 starter pistols, forms the basis of this action. They are divided into 5,758 DA-1 models and 10,421 DA-4 models (A. 15).

7. The Government's Failure To Act; Institution of Suit by Lee

Months elapsed without the government commencing proceedings for the condemnation of the seized property, notwithstanding repeated requests by Lee and his attorney for the commencement of a proceeding so that the validity of the seizures would be adjudicated (B. 6). For that reason, on April 16, 1970, Lee commenced an action (70 Civ. 562) in the United States District Court for the Eastern District of New York by filing a summons and complaint which named the appropriate officials of the

United States Government as defendants. Lee's action requested judgment against the defendants as follows:

> "(1) Enjoining, prohibiting and restraining the said defendants from taking any action with reference to the said .22 calibre blank starter pistols which will result in their confiscation and destruction.
>
> "(2) Enjoining,, prohibiting and restraining the Bureau of the Customs of the Treasury Department from assessing any [firearms] duty against the said starter pistols.
>
> "(3) Adjudging any one of the following:
>
> "(a) That the defendants be directed to deliver the said property to the plaintiff forthwith;
>
> "(b) That the defendants permit the plaintiff forthwith, if it should be found that any of the merchandise is in violation of a statute, to make the necessary merchanical corrections to insure that the blank starter pistols will be incapable of expelling a projectile by the action of an explosive, and then to return the said pistols to the plaintiff.
>
> "(c) That the defendants permit the plaintiff to return the said 16,182 .22 calibre blank starter pistols in bond, to their manufacturer, Molso, in Italy, for a refund" (A. 10-11).

On April 29, 1970, with the above action pending, the United States Attorney for the Eastern District of New York filed a "civil and maritime complaint in rem", (70 Civ. 562), praying that a warrant issue for the arrest of the already seized starter pistols and demanding judgment that the pistols be condemned as forfeited to the United States for disposition according to law (A. 14-19). On the same day, the requested warrant was issued by the

United States District Court for the Eastern District of New York (A. 12-13).

On May 20, 1970, Agent Rowley converted four of the seized devices, with an *electric drill,* in six, ten, twelve and four minutes, respectively (C. 8, 9, 10, 11).

The two actions were consolidated for trial.

8. The Trial (June 10-11, 1970)

A. Lee's Case

Lee was called as a witness in his own behalf and testified, as noted above, concerning: his transactions with Molso; his documented emphasis, during the manufacturing process, that the starter pistols conform to the requirements of the Gun Control Act; the various approvals received from ATF; and the seizures. At the end of his testimony, the Court granted the government's motion for a dismissal of Lee's action, upon the grounds that:

> "I find that there's no merit in keeping that complaint alive. No jurisdiction of the subject matter. No equitable jurisdiction. And the remission matter is in the discretion of the administrative party. The Secretary of the Treasury" (B. 80-81).

The Court gave no further rationale for its ruling except to state: "There is an adequate remedy of law and no irreparable damage" (B. 82).

B. The Government's Case

Aside from the testimony of Agents Westenberger, Rowley and Wessler, the government adduced testimony from a chemist and a metallurgist. The chemist testified that he examined the approved samples of the DA-1 and the DA-4 and compared their composition to that of seized samples of the same models. His conclusion was that

there was "no significant difference in the composition of the metal" (B. 94).

The metallurgist testified that, by means of specialized testing equipment, he was able to ascertain that the hardness of the metal differed among all the specimens, but that it was substantially different as between the approved samples and the seized samples (B. 99, 101-102; 110-115). Although he did not attempt to drill through any of the items he tested, it was his opinion that the plugs in most of the seized pistols "would very easily be machined out with a *good quality* tool" (B. 114). *He confirmed that a visual examination* would not indicate that the seized items were different from those which had been earlier submitted to ATF (B. 124).

C. The Method of Test Firing

With all the evidence concerning the ability to "convert" these starter pistols, it is significant that no one was willing to shoot one of the converted devices manually. Thus, on cross-examination, Agent Rowley testified as follows:

> "Q. Would you be willing to try in Court if I asked you to put a bullet in there and hold it in your hand and fire it? A. Not in this condition. But I will fire it from a vise, though.
>
> "Q. You would not be willing to do it in Court, though? A. No" (C. 33).

D. The Lack of Evidence Concerning the Ability of a Non-Expert to Convert the Starter Guns

All of the agents who attempted to convert the devices in question were experts. Although the DA-1 models had been in circulation for more than a year, there was no known instance of one which had been converted, other than those converted by ATF.

E. The Reason for the Difference Between the Approved Samples and the Later Imported Items

It was made clear, by the testimony of the government's experts, that a visual examination would not indicate that the seized items were different from the earlier approved samples (B. 124). Although the same materials were used to manufacture both groups (B. 94), a microscopic variation, resulting in increased porosity (B. 111), caused by a deficiency in the tempering process during manufacturing (C. 73), was the source of the difference.

It was established by documentary evidence, and it was undisputed at trial, that Lee had insisted upon "strong quality control" in the manufacture of the starter guns (Lee Ex. 9, in evidence, B. 41), and had repeatedly emphasized that they not be able to shoot live ammunition (Lee Exhibits 2, 3, 4, 5, 6, 7, 23).

Reasons for Granting the Writ

The instant case raises substantial and timely issues concerning the constitutionality and equity of the administration of certain aspects of recent federal gun control legislation.

The Gun Control Act—Title 18 U.S.C. Chapter 44—is a comprehensive legislative scheme for the regulation of the distribution of firearms. Section 921(a)(3) defines a firearm as:

> "any weapon, (including a starter gun) which will or is designed to *or may readily be converted to* expel a projectile by the action of an explosive" [emphasis added].

Section 22 makes it unlawful for any person, without a federal license, to import a firearm. Section 923(a)(2)(B) provides for the procedure by which a federal license for

the distribution of firearms may be obtained for a fee of $50.00 per year. *Section 924(a)* provides for the imposition of criminal penalties of up to a $5,000 fine and up to five years imprisonment for violations of the provisions of Chapter 44. *Section 924(d)* provides for the forfeiture of firearms which are "involved in or used or intended to be used in, any violation of the provisions of" Chapter 44. *Section 925* provides for "examination and testing in connection with the making of a determination as to whether the importation of certain firearms will be allowed." *Section 926* empowers the Secretary of the Treasury to prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of the Act, and requires that he give reasonable public notice prior to prescribing such rules and regulations.

This Petition challenges the constitutionality of the procedures by which the Secretary of the Treasury seeks to apply the phrase "may readily be converted to expel a projectile", found in Section 921(a)(3), to devices that are not firearms in their manufactured state. This Petition also challenges the procedures by which the petitioner was caused to forfeit substantial quantities of such devices, although he imported them only *after* receiving a ruling from the Treasury Department that they were not "readily convertible", and where the greater part of such importation took place *after* the Treasury Department, concededly, knew that it would rescind its prior ruling, but *before* the petitioner was given notice of such intention.

An examination of the issues thus presented requires an awareness of the Congressional purpose in enacting the Gun Control legislation, and must be viewed within the context of the rules of construction and administration which are applicable to quasi-criminal forfeiture proceedings.

A. The Congressional Declaration of Purpose

When Congress enacted the legislation here involved, it provided that:

> "The Congress hereby declares that the purpose of this title is to provide support to federal, state, and local law enforcement officials in their fight against crime and violence, and *it is not the purpose of this title to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens* with respect to the acquisition, possession or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discouragee or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, *or provide for the imposition of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.*" Section 101 of Pub. L. 90-618 [emphasis added].

Similarly, in regard to the same legislation, Congress stated:

> "The Congress further hereby declares that the purpose of this title is to cope with the conditions referred to in the foregoing subsection, and that *it is not the purpose of this title to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens* with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, *or provide for the imposition by federal regulations of any procedures or requirements other than those reasonably*

necessary to implement and effectuate the provisions of this title." Section 901 of Pub. L. 90-351 [emphasis added].

It can thus be seen that Congress, both in the enactment of the original legislation and in the amendment of that legislation, was particularly concerned that the administration of the Gun Control Law be fair and equitable and not unnecessarily burdensome upon those who seek to lawfully deal in or use firearms and related items.

B. Construction of Statutes Which Provide For Criminal Penalties and Forfeitures

This Court has held that "forfeitures are not favored; they should be enforced only when within both letter and spirit of the law" *United States* v. *1936 Ford V-8*, 307 U.S. 219, 226 (1939); *Farmer's & M. National Bank* v. *Dearing*, 91 U.S. 29, 35 (1875). Generally, statutes imposing forfeitures being penal in nature, must be strictly construed in favor of defendants. *Hannifin* v. *United States*, 248 F.2d 173 (9th Cir., 1957); *United States* v. *Five Gambling Devices*, 252 F.2d 210 (7th Cir., 1958).

The fact that the Gun Control Act is located in Title 18 of the United States Code, and that Section 924 of the Act, which contains fine and imprisonment provisions (subsection A) impel the conclusion that the statutory language of this act must be construed and applied in the manner appropriate to penal legislation.

In *Boyd* v. *United States*, 116 U.S. 616 (1886), Mr. Justice Bradley, speaking for the Court, said:

> "We are clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature, criminal. * * * If the Government

> prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens * * * ? This cannot be. This information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the Commission of offenses against the law, are of this quasi-criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. . . ." 116 U.S. at 633-34.

The above holding in *Boyd* was reaffirmed by this Court in *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 697-698 (1965).

I.

The Court of Appeals, in upholding the constitutionality of the manner in which the definition of "firearm" was applied to the facts of this case, held as follows:

> "The Gun Control Act clearly puts importers and others on notice that they must have a license if they place "readily" convertible starter guns on the market. The uncontroverted testimony of government witnesses conclusively shows that all eighteen of the samples which were tested were converted into instruments capable of discharging projectiles in twelve minutes or less. Reasonable men would surely agree that guns which can be so quickly transformed into dangerous weapons, are 'readily convertible,' whatever else that term may mean. Especially in civil proceedings such as here, the statutory standard is sufficiently definite.
>
> "Accordingly we hold that 18 U.S.C. § 921(a)(3) is constitutional as applied to the facts of this case. * * *" (Appendix A, hereto, *infra*, p. 6a).

The Treasury Department utterly failed in giving any guidelines to dealers in starter guns and similar devices as to the standards which were to be applied in the construction of the phrase "may readily be converted" found in 18 U.S.C. § 921(a)(3). That Congress anticipated such guidelines, is indicated by 18 U.S.C. § 926 which empowers the Secretary of the Treasury to "prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter. . . .". ATF was merely content to accept samples for testing, pursuant to 18 U.S.C. § 925, and apply unrevealed, ad hoc standards, in determining whether it would issue a letter of approval.

As far as is known, the first enunciation of a standard took place at the trial of the instant case, where Agent Rowley conceded:

> "A. The law is a very broad law. It doesn't state the amount of time. The policy is if using available tools if they can be converted within a period of 15 minutes or less, this would fall into a readily converted. — — Well, a ready conversion. This is premised on the basis that you can make a firearm using the antenna from a car in that time" (C. 59).

Concededly, the government agents, all experts in the firearms field, were able to "convert" the starter pistols in less than fifteen minutes. In its opinion, the Court of Appeals stated that, where it is shown that such conversions can be made in twelve minutes or less;

> "reasonable men would surely agree that guns which can be so quickly transformed into dangerous weapons are 'readily convertible' whatever else that term may mean. Especially in civil proceedings such as here, the statutory standard is sufficiently definite." (Appendix A hereto, *infra*, p. 6a).

We respectfully submit that the Court of Appeals' treatment of this subject was superficial, at best. In the absence of reasonable guidelines, how was a dealer to know that the standard contemplated conversion by experts, or by means of high speed drills? Indeed, the test used by ATF before it granted approval of the DA-1, did not make use of a high speed drill, but only a hacksaw (*supra*, p. 7).

In addition, how were dealers to know that convertibility into an *unstable* firearm was contemplated by the unenuncia|ted standards of ATF? In this regard, it is significant that the allegedly converted starter pistols were test-fired by ATF from vices, and that Agent Rowley refused to fire one of the converted devices by hand (*supra*, p. 14). If these secret standards are appropriate, then an ordinary carpenter's hammer would fall within the proscription of the statute since it would be able to explode ammunition by means of impact.

Finally, ATF never requested a follow-up inspection of samples of the imported finished product. It was content to sit back and permit dealers to act at their peril concerning the application of standards which it never enunciated.

In *Connally* v. *General Construction Co.*, 269 U.S. 384 (1923), this Court held:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement. . . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

As was noted in *Ricks* v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir., 1968), at 1101:

> "Definitional uncertainty is an open invitation, if indeed not inevitably an antecedent, to virtually unrestrained administration."

We respectfully submit that, in view of the rules of strict construction here applicable (*supra*, pp. 17-18), and the Congressional intent with which this scheme of legislation was enacted (*supra*, pp. 18-19), the petitioner was deprived of due process of law within the meaning of the above holding, by virtue of the failure of the Secretary of the Treasury to specify any standards to which dealers would be held in the application of the imprecise language found in the statute's definition of the term "firearms". For that reason, the penalty of forfeiture should not be imposed, but the Congressional intent should be preserved by permitting the petitioner either to modify the starter guns so as to conform to the required standard, or by permitting him to return the starter guns to their country of origin.

II.

In the present case, the Petitioner did everything that could reasonably be expected of him. He instructed his supplier to manufacture the starter guns in a manner which would cause them to conform to the Gun Control Act (*supra*, pp. 6, 15); he submitted the samples to ATF and he did not place any orders until ATF had pronounced the devices "not readily convertible" (*supra*, pp. 6-8); and he stopped further orders as soon as he received indirect notice that the government was questioning the quality of the imported items (*supra*, p. 9).

The Government, on the other hand, knew that the first shipment of starter guns were capable of conversion in less than fifteen minutes on August 15, 1969 (*supra*, p. 8). Yet, the Government waited until November 6, 1969, almost three months, before giving an indication of its position to Lee (*supra*, p. 10). In the interim, Lee had ordered and received the vast majority of the starter guns which formed the basis for the forfeiture action (*supra*, pp. 8-10).

The government's experts conceded that a visual examination would not indicate that the imported models differed in any respect from the approved samples (*supra*, pp. 13-15). The record is devoid of any indication that Lee was aware of the variance.

In its opinion, the Court of Appeals notes that the manufacturer, in a letter to Lee, had questioned whether the DA-4 sample would be approved by the Government (Appendix A, hereto, *infra*, p. 4a). The fact is that the sample was submitted by Lee to the Government subsequent to the receipt of that letter, and the Government did approve the model (*ibid.*). Indeed, government tests revealed that it took more than forty minutes for that sample to be converted (*supra*, p. 7)—far longer than its standards required.

We respectfully submit that the government should be estopped from taking the position that the starter guns should be forfeitted.

The Court of Appeals has taken the position that the lack of "scienter or guilty knowledge", on the part of Lee, to violate the statute is irrelevant (Appendix A, hereto, *infra*, p. 6a). We respectfully submit that, within the circumstances of this case, the lack of wrongful disposition, combined with the Government's failure to give reasonable notice to Lee of its findings, should properly estop the government from demanding a forfeiture of the seized items.

We *do not* propose that the devices should be returned to Lee for him to place on the market in their present condition. In his suit against the government, Lee advanced, as possible relief, two other alternatives: 1) that he be permitted to make such alteration in the devices as to render them acceptable to the Government; or 2) that he be permitted to return the devices to the Italian manufacturer (*supra*, pp. 11-12). Principles of fair dealing, as well as the clear Congressional intent, require that the Government be limited to one of these alternatives.

In applying the doctrine of equitable estoppel to the Federal Government, the Court of Appeals for the Ninth Circuit has set forth the following basic principles in *United States* v. *Georgia Pacific Co.*, 421 F. 2d 92, at 95-96:

> "Equitable estoppel is a doctrine adjusting the relative rights of parties based upon consideration of justice and good conscience. Smale & Robinson, Inc. v. United States, 123 F. Supp. 457, 463 (S.D. Cal., 1954); Peoples National Bank v. Manos Brothers, Inc., 226 S.C. 257, 84 S.E. 2d 857, 870, 45 A.L.R. 2d 1070 (1954); 3 Pomeroy, Equity Jurisprudence §§ 801, 802 (5th ed. Symons 1941); 28 Am. Jur. 2d Estoppel and Waiver § 28, at 629. Pomeroy has defined equitable estoppel as having the effect of absolutely precluding a party, both at law and equity.
>
> > '[f]rom asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.'

"3 Pomeroy § 804, at 189 See also Dickerson v. Colgrove, 100 U.S. 578, 580, 25 L.Ed. 618 (1879); Bankers Trust Co. v. Pacific Employers Insurance Co., 282 F.2d 106, 112 (9th Cir., 1960). Equitable estoppel prevents a party from assuming inconsistent positions to the detriment of another party, Leopold v. Inland Steel Co., 125 F.2d 369, 375 (7th Cir., 1941) or, as stated in Bigelow, Law of Estoppel 603 (6th ed., Carter 1913), 'He who keeps silent when duty commands him to speak shall not speak when duty commands him to keep silent.' See also, 31 C.J.S. Estoppel § 108, at p. 548.

"Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules. City of Chetopa v. Board of County Com'rs., 156 Kan. 290, 133 P. 2d 174, 177 (1943). An equitable estoppel will be found only where all the elements necessary for its invocation are shown to the court. The test in this circuit was reiterated in Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104, 84 A.L.R. 2d 454 (9th Cir., 1960):

'Four elements must be present to establish the defense of estoppel: (1)The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F2d. 520, 525.'"

The Court further stated:

"Mr. Justice Holmes once wrote, 'Men must turn square corners when they deal with the Government,' but it is clear that the Government is it-

self becoming more reasonable by permitting those corners to be rounded when reason and logic demand that the Government be held to the same standard of rectilinear rectitude that it demands from its citizens. One commentator has summarized the law in this area by saying that, 'The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice.' We agree, and we find that the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case" 421 F.2d 92 at 103.

In *United States* v. *Hanna Nickel Smelting Co.*, 253 F. Supp. 784 (D. Oregon, 1966) aff'd. 400 F.2d 944 (9th Cir., 1968), the Court made clear that acquiescence is a ground for estoppel against the Government and that the Government has a duty to speak when information comes into its possession which should be communicated to private parties who have acted in reliance upon Government representations:

"Where acquiescence is the ground for estoppel, there is no occasion for the party who claims the estoppel to change his position; he 'relies' by continuing his established practice. Mahoning Investment Co. v. United States, 3 F. Supp. 622, 78 Ct. Cl. 23 (1933), cert. denied, 291 U.S. 675, 54 S. Ct. 526, 78 L. Ed. 1064 (1934). The Company asserts that it understood the Government's silence to indicate approval of the Company's accounting practices. Had the Government objected, the Company might have been able to resolve the dispute without increasing its exposure. I find that the Company relied to its detriment on the Government's silence.

"The Government also contends that the Company had no right to rely on the Government's silence since the Government was under no duty to speak. It asserts that no Government agent relied on by the Company had authority to approve the Company's accounting decisions. This argument misses the point.

"The Government, like a private corporation, acquires knowledge through its agents. Under well-established principles of agency, a principal is bound by the knowledge of its agent concerning a matter upon which it is the agent's duty to give the principal information. Restatement, Agency 2d § 272. It is no defense that the agent did not, in fact, communicate his knowledge to his principal. Bowen v. Mt. Vernon Savings Bank, 70 App. D.C. 273, 105 F.2d 796 (1939)." 253 F. Supp. 784 at 793.

See also: *Massaglia* v. *Commissioner of Internal Revenue*, 286 F.2d 258, 262 (10th Cir., 1961); *United States* v. *Fox Lake State Bank*, 366 F.2d 962, 965 (7th Cir., 1966); *Walsonavich* v. *United States*, 335 F.2d 96, 100-101 (3rd Cir., 1964).

Applying the above principles to the facts of the present case, the penalty of forfeiture should not have been imposed, and the Petitioner should have been permitted to remedy the situation, either by modifying the starter guns or by returning them to the Italian manufacturer.

CONCLUSION

For all of the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

SIDNEY SCHREIBERG
HENRY J. BOITEL
Attorneys for Petitioner

Appendix A

Opinion of the United States Court of Appeals For The Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 701—September Term, 1970.

(Argued March 31, 1971 Decided June 8, 1971.)

Docket No. 35490

UNITED STATES OF AMERICA,

Appellee,

—v.—

16,179 MOLSO ITALIAN .22 CALIBER WINLEE DERRINGER CONVERTIBLE STARTER GUNS,

Appellant.

GOODWIN LEE, doing business as WESTBURY SALES CO.,

Appellant,

—v.—

DAVID M. KENNEDY, as Secretary of the Treasury, RANDOLPH W. THROWER, as Commissioner of Internal Revenue, LESTER D. JOHNSON, as Commissioner of Customs, HAROLD A. SERR, as Director of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service of the Department of the Treasury, and JOHN L. PIPER, Chief, Enforcement Branch of the Internal Revenue Service of the Department of the Treasury,

Appellees.

Before:

FRIENDLY, *Chief Judge*,
LUMBARD and HAYS, *Circuit Judges*.

Appeal from a combined judgment of the United States District Court for the Eastern District of New York, Bruchhausen, *J.*, ordering forfeiture of 16,179 pistols seized by the government and dismissing appellant's action to enjoin confiscation. Affirmed.

MICHAEL F. CRAWFORD, Assistant United States Attorney (Edward R. Neaher, United States Attorney for the Eastern District of New York, and David G. Trager, Assistant United States Attorney, on the brief), *for appellee*.

SIDNEY SCHREIBERG, New York, New York, *for appellants*.

LUMBARD, *Circuit Judge*:

Goodwin Lee appeals from a combined judgment of the United States District Court for the Eastern District of New York, entered in two cases which were tried together before Judge Bruchhausen, which condemned 16,179 Moiso Italian .22 caliber Derringer Starter Guns belonging to Lee. Lee also appeals from Judge Bruchhausen's dismissal of his suit to enjoin the government from confiscating these same starter pistols that Lee had imported from Italy.

The only question is whether 18 U.S.C. §921(a) which defines a firearm as "any weapon (including a starter gun) which . . . may readily be converted to expel a projectile by the action of an explosive" is unconstitutionally vague

because of the words "may readily be converted." As applied to the facts of this case, we find no infirmity in the statute, and, accordingly, we affirm the judgments.

Lee was not a licensed dealer in firearms under the federal act, 18 U.S.C. §921, et seq. As U.S.C. §924(d) provides for the forfeiture of firearms imported contrary to the statute, i.e., by an unlicensed dealer, the central issue is whether the 16,179 starter guns which the government seized in 1969 at Lee's place of business in Westbury, Long Island, and which Lee had imported from the Molso Company in Como, Italy earlier that year, were firearms within the meaning of the statute.

In August, 1969, David Wessler, an Agent of the Alcohol Tax and Firearms Division of the Internal Revenue Service, purchased a starter gun from one Mogul who had bought the gun and other similar guns from Lee. Wessler was able to convert the gun to fire live ammunition within a few minutes. Another ATF agent who purchased a similar gun from Mogul was able to convert the gun in five or six minutes and to fire it. Thereafter, on December 8 and 22, 1969, officers of ATF seized a total of 16,179 Molso starter guns at Lee's place of business. Lee then commenced the action to enjoin confiscation by the government. When the government brought its action to enforce forfeiture, the district court, on stipulation of the parties, ordered the cases consolidated for trial.

At trial the government showed that four samples taken at random from the seized guns were converted by Agent Rowley in four, six, ten and twelve minutes, after which he fired live ammunition from each gun. Another ATF firearms expert was able to convert a number of samples in from three to eight minutes by means of an electric drill, after which he was able to fire .22 caliber ammunition from them. This evidence to which Lee offered no defense was sufficient to sustain the judgments.

The government also showed that three sample Molso starter pistols which the ATF had examined and approved as not being firearms differed from the seized pistols. On January 7, 1968, Lee left at ATF headquarters a handmade sample starter pistol which the Division designated as Model D/A #1. On April 1, 1969, he submitted two other handmade samples which, unlike D/A #1, could also be used to propel tear gas. The ATF designated these as D/A #3 and D/A #4. All of the seized pistols here involved were models D/A #1 and D/A #4. Although the ATF had approved the handmade prototypes which Lee had submitted, a metallurgical engineer testified without contradiction that the quality of the metals used in the factory produced models was inferior to those used in the handmade samples, and thus the production models unlike the samples could be transformed readily into lethal weapons.

Lee received a letter from Molso, dated March 22, 1969, which stated:

> "According to our experience, the Sample B [D/A #4] should not be accepted by Washington offices as it is not difficult to drill the barrels and make them suitable to shoot live ammunitions. The Sample A [D/A #3] should be suitable as it is quite impossible to drill out the steel inside the barrel."

Lee never advised the ATF of this letter even though D/A #4 was not approved until May 8, 1969. Indeed, he proceeded to order over 20,000 D/A #4 pistols but none of the more expensive D/A #3 models.

We agree with Judge Bruchhausen's holding, 314 F. Supp. 179 (E.D.N.Y. 1970), that these guns which could be converted to shoot live ammunition within three to twelve minutes were readily convertible and Lee, an unlicensed dealer in firearms, could not lawfully import them. Con-

sequently, they were subject to forfeiture under 18 U.S.C. §924 (d).[1]

We find the statute sufficiently definite. Its language clearly warns that "any weapon (including a starter gun)" which can be converted by a relatively simple operation taking only a few minutes is a "firearm" and subject to federal controls and seizure.

The test to be applied is whether the language conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,,* 332 U.S. 1, 8 (1947). See also Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). If a statute is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application," then it violates due process. *Conally* v. *General Construction Co.,* 269 U.S. 385 (1923). Nevertheless, as Mr. Justice Black stated in a criminal case where, of course, the vagueness standard is most stringently applied:

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . . The Constitution does not require impossible standards." *United States* v. *Petrillo,, supra,* 332 U.S. at 7.

The Gun Control Act clearly puts importers and others on notice that they must have a license if they place

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[1] The government points out that such guns in the hands of an unlicensed dealer who operates a mail order house, as does Lee, could all too easily be distributed to criminal elements without any trace of the purchasers.

"readily" convertible starter guns on the market. The uncontroverted testimony of government witnesses conclusively shows thot all eighteen of the samples which were tested were converted into instruments capable of discharging projectiles in twelve minutes or less. Reasonable men would surely agree that guns which can be so quickly transformed into dangerous weapons are "readily convertible," whatever else that term may mean. Especially in civil proceedings such as here, the statutory standard is sufficiently definite.

Accordingly, we hold that 18 U.S.C. §921(a) (3) is constitutional as applied to the facts of this case. As the Supreme Court said in *United States* v. *Petrillo, supra,* 332 U.S. at 8: "The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

Lee further argues that even though this is a civil action the government must show some element of scienter or guilty knowledge on his part. We do not agree. As the proper purpose of the statute is to keep such potentially dangerous weapons out of the hands of unlicensed dealers, we can see no reason for requiring scienter or for reading into the statute what is not there. Anyone who engages in the business of importing such devices as starter guns properly is held bound to know or to inquire as to their potential convertibility into dangerous weapons.

In any event, the record fully supports the conclusion that Lee was well aware of the statute, that he had many years of experience as an importer of such devices, that he had notice of the shortcomings of D/A #4 if not of

D/A #1, and that the guns he chose to import were readily convertible so as to be firearms subject to federal control and to seizure from an unlicensed dealer.[2]

Affirmed.

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[2] We find it unnecessary to decide whether Judge Bruchhausen was correct in dismissing Lee's separate action on the basis of lack of subject matter and equitable jurisdiction. Lee's opportunity to defend in the government's forfeiture action may provide an adequate remedy at law, and 19 U.S.C. § 1618 may preclude judicial interference against the Secretary of the Treasury with reespect to seized property. See *United States* v. *Heckinger*, 163 F.2d 472 (2d Cir. 1947).

Appendix B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 70 C 56

UNITED STATES OF AMERICA,

Plaintiff,

—against—

16,179 MOLSO ITALIAN .22 CALIBER WINLEE DERRINGER CONVERTIBLE STARTER GUNS,

Defendant.

Civil Action No. 70 C 475

GOODWIN LEE, doing business as WESTBURY SALES CO.,

Plaintiff,

—against—

DAVID M. KENNEDY, as Secretary of the Treasury, RANDOLPH W. THROWER, as Commissioner of Internal Revenue, LESTER D. JOHNSON, as Commissioner of Customs, HAROLD A. SERR, as Director of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service of the Department of the Treasury, and JOHN L. PIPER, Chief, Enforcement Branch of the Internal Revenue Service of the Department of the Treasury,

Defendants.

The issues inthe above-entitled action having come on for trial before Honorable Judge Walter Bruchhausen, without a jury, at a Trial Term of the United States District Court for the Eastern District of New York, held at the Courthouse, on the 10th and 11th days of June, 1970, and the United States having appeared by its attorney, Ed-

ward R. Neaher, by Michael F. Crawford, of counsel, and Goodwin Lee having appeared by his attorney, Sidney Schreiberg, and the issues having been duly tried and the Court having rendered a judgment on the remaining cause of action on the 16th day of June, 1970, in favor of the United States, and that judgment stating:

Action, entitled No. 70 C 475, was commenced on April 16, 1970, by the plaintiff therein, Goodwin Lee, an importer and dealer in guns, to enjoin the Government from confiscatting and destroying 16,179 starter pistols, imported by him from Italy, and to restrain the Bureau of Customs from assessing duties thereon.

Certain pistols, imported by Lee, prior to May 5, 1969, were found admissible to this country and not in violation of the Gun Control Act of 1968, 18 U.S.C. §921(a) (3) et sequa.

The principal issue pertains to 16,179 pistols, imported by Lee from Italy, subsequent to May 5, 1969.

On December 8, 1969, the Government seized 15,942 of those pistols at Lee's place of business in Westbury, Long Island, and an additional 237 on December 22, 1969, a total of 16,179.

The first case tried was the aforesaid action No. 70 C 475. The Government's motion to dismiss the complaint therein upon the grounds that there was no jurisdiction of the subject matter, no equity jurisdiction, that remission of a forfeiture is an administrative matter in a proceeding before the Secretary of the Treasury and that a District Court has no jurisdiction to enjoin the Bureau of Customs, was granted.

Thereupon, the Government introduced evidence in support of its in rem action, No. 70 C 562, commenced on

Apirl 29, 1970, to enforce forfeiture of the 16,179 pistols, seized by it, as aforesaid, in December 1969.

The actions were consolidated by order, ated May 1, 1970.

Title 18, U.S.C. §924(d) and Sections 7321 and 7323 of the Internal Revenue Code of 1954 provide, in substance that any firearm used or intended to be used in violation of the aforementioned Gun Control Act shall be subject to seizure and forfeiture by the Secretary of the Treasury or his delegate.

The relevant Sections of the said Gun Control Act are as follows:

"18 U.S.C. §921(a) *

(3) The term 'firearm' means (A) any weapon (including a starter gun) which * may readily be converted to expel a projectile by the action of an explosive **.

"18 U.S.C. §922(a) It shall be unlawful—

"(1) for any person, except a licensed importer, * or licensed dealer, to engage in the business of importing, * or dealing in firearms * or in the course of such business to * receive any firearm in * foreign commerce.

"18 U.S.C. §923(a). No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary (of the Treasury)."

Admittedly, Mr. Lee imported the said 16,179 guns from Italy. There is neither claim by him nor evidence that he was registered under the Gun Control Act as an importer

of firearms nor that he was registered, as a dealer in firearms.

The sole issue in the said action, No. 70 C 562, is whether the said guns, seized by the Government, could "readily be converted to expei a projectile by the action of an explosive." If so, Lee violated the Gun Control Act, thus warranting the seizure.

Five witnesses testified for the Government. The substance of their testimony was that eighteen guns, selected at random, were tested. The steel plugs, between the bases and barrels were bored to ascertain how quickly they could be rendered usable for live ammunition i.e. readily convertible.

Lee called no witnesses. He contended that the testing of only eighteen guns was too small a number; that he endeavored to stop the shipment, when he learned of the Government's claim and that he was innocent of intent to violate the statute.

The gun control statute is violated if an unlicensed individual imports or deals in firearms, whether or not he does so willfully and/or intentionally.

Now, on motion of Edward R. Neaher, United States Attorney for the Eastern District of New York, attorne for the plaintiff, it is hereby

Ordered and adjudged that the above-described articles be condemned as forfeited to the United States; and it is further

Ordered and adjudged that the United States Marshal for this District be, and he is hereby directed to retain possession of these 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns pending disposition

of the Petition for Remission by the Attorney General; and it is further

Ordered and adjudged that the United States Marshal for this District be, and he is hereby directed to dispose of these guns in accordance with the directions of the Attorney General.

Dated: Brooklyn, New York

June 30th, 1970

/s/ WALTER BRUCHHAUSEN
U.S.D.J.

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

October Term, 1972

No. 71-1[illegible]

14,340 Moles Fraleigh, Jr. College Watch Dealers Corporation, Stanley Gutz, Petitioner

v.

United States of America

No. 71-1[illegible]

Goodwin Lee, Doing Business as Westbury Sales Co., Petitioner

v.

David M. Kennedy, Secretary of the Treasury, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief for the United States in Opposition

Erwin N. Griswold,
Solicitor General,

Scott P. Crampton,
Assistant Attorney General,

Ernest J. Brown,
Assistant to the Solicitor General,

Meyer Rothwacks,
Attorney,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-344

16,179 MOLSO ITALIAN .22 CALIBER WINLEE DERRINGER CONVERTIBLE STARTER GUNS, PETITIONER

v.

UNITED STATES OF AMERICA

GOODWIN LEE, DOING BUSINESS AS WESTBURY SALES CO., PETITIONER

v.

DAVID M. KENNEDY, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is reported at 314 F. Supp. 179.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1971. The petition for a writ of certiorari was filed on September 7, 1971. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the definition of "firearms" in the Gun Control Act of 1968 (18 U.S.C. 921(a)(3)) is unconstitutionally vague.

2. Whether under the circumstances of this case the United States should have been held estopped from seizing and condemning the starter guns.

STATUTES INVOLVED

Title 18 U.S.C. 921—Definitions—

(a) As used in this chapter.

* * * *

(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive * * *.

Title 18 U.S.C. 924—Penalties—

* * * *

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forefitures under the provisions of this chapter.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of New York, 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns belonging to petitioner were ordered condemned as forfeit to the United States because they were readily convertible to fire live ammunition (18 U.S.C. 921(a)(3); Pet. App. B; 314 F. Supp. 179).[1] The court of appeals affirmed (Pet. App. A).

Petitioner is not registered under the Gun Control Act of 1968 (18 U.S.C. 921, *et seq.*) as a firearms dealer (I Tr. 67-68).[2] In 1967, petitioner traveled to Como, Italy, to negotiate with the Molso Company concerning the manufacture by Molso of .22 caliber

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[1] An action by petitioner against the Secretary of the Treasury and other officials to enjoin the confiscation suit was dismissed for lack of subject matter jurisdiction (Pet. App. B, 9a).

[2] "Tr." refers to the two-volume transcript of proceedings in the district court.

starter guns for import by petitioner to the United States (I Tr. 26-28). Thereafter, sample starter guns were sent to petitioner Lee for the purpose of testing for compliance with the Gun Control Act of 1968 (18 U.S.C. 921, *et seq.*).

On January 7, 1969, petitioner delivered a sample of one model of the starter guns, designated model DA-1, to the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service for testing (I Tr. 38; II Tr. 50, 54). Agent Westenberger of the Division tested the sample and determined that it was not readily convertible into a device capable of expelling a projectile by the action of an explosive, and, for that reason, not a "firearm" within the meaning of 18 U.S.C. 921(a)(3), *supra*, p. 2. On January 13, 1969, the Division sent petitioner a letter informing him of this determination (II Tr. 54-55; I Tr. 38-39).

On or about April 1, 1969, petitioner gave the Division two more prototypes, designated models DA-3 and DA-4. Agent Westenberger tested them for conformity with the Act and determined that they were incapable of ready conversion. Petitioner was so informed by letter on May 8, 1969 (II Tr. 57-59, 61; I Tr. 53-54). Prior to receipt of the prototype from Italy and prior to receipt of the May 8, 1969 letter from the Division, petitioner had received a letter from the Molso Company, dated March 22, 1969, relating to the anticipated delivery to petitioner of prototypes DA-3 and DA-4, which in pertinent part, read (I Tr. 46-47):

> * * * According to our experience the sample B [DA-4] should not be accepted by Washington offices as not difficult to drill and suitable to shoot. Sample A [DA-3] should be acceptable as impossible. * * *

Petitioner, nevertheless, ordered and received substantial quantities of the manufactured version of models DA-4 and DA-1 (but no model DA-3's), between May 8 and September 30, 1969.

On August 15, 1969, Agent Wessler of the Alcohol, Tobacco and Firearms Division, acting in an undercover capacity, purchased a production line version of DA-1 from one Mitchell Mogel, a licensed firearm dealer, who had obtained it from petitioner (I Tr. 126). At the time of Wessler's purchase of the gun in August, he did not know and was not told that Mogel had obtained it from petitioner (I Tr. 133-134). The agent took the pistol home and was able to convert it to fire live ammunition in only a few minutes. Thereafter the gun was sent to the Division office in Washington and was returned to Wessler in October 1969, and turned over by him to another agent (Rowley) who was conducting the investigation (I Tr. 127-130). Agent Rowley, acting in an official capacity, first visited Mogel on October 8, 1969. At that time Rowley asked and was told by Mogel that Mogel obtained the pistols from petitioner (I Tr. 136-137). During that October 8 visit Rowley advised Mogel that the guns were "firearms" within the Gun Control Act of 1968 (I Tr. 138). On or about October 13, 1969, Mogel called petitioner and informed

him of Rowley's visit and the possibility of a violation (I Tr. 59). Thereafter, petitioner attempted to stop a shipment of guns that had been previously ordered from Molso. He was unable to stop shipment, but prevented them from being formally entered into the United States. Those guns are therefore not a part of the present case (I Tr. 59-61; see Pet. 9).

On November 4, 1969, Agent Rowley obtained a production model DA-4 from Mogel and converted it to fire live ammunition in approximately five or six minutes (I Tr. 143-145). On November 6, 1969, Rowley notified petitioner that the permits for the starter guns were being reconsidered and that he should not sell any more guns pending further tests. Petitioner did not make any further sales (I Tr. 146-148). On December 8, and December 22, 1969, petitioner's stock of starter guns was seized by agents of the Division pursuant to 18 U.S.C. 924(d), *supra*, p. 3 (I Tr. 64, 153-154).

Agent Rowley subsequently tested five of the guns and was able to convert all of them using an electric drill. Four were converted in periods of time between four and twelve minutes and found capable of firing live ammunition (II Tr. 7-12). Agent Westenberger also tested a number of the seized guns, including model DA-1 as well as DA-4. Each was converted within a matter of minutes and each fired live .22 ammunition (II Tr. 65-70).

Harold Weinberg, an independent metallurgical engineer, testified that the metals used to obstruct the barrels in the seized manufactured models were

not as hard as those used in the hand-made prototypes which the Division had previously advised petitioner did not violate the Act (I Tr. 111-115). Unlike the prototypes, the production models were easily convertible into weapons capable of firing live ammunition (I Tr. 114-115; II Tr. 71).

ARGUMENT

1. Petitioner contends that the language in 18 U.S.C. 921(a)(3) *supra*, p. 2, "may readily be converted to expel a projectile," is unconstitutionally vague and that he was denied due process of law by the failure of the Secretary of the Treasury to prescribe additional standards defining the statutory term "firearm." The contention that the statute is vague is plainly insubstantial and was properly rejected in the opinion of the court below (Pet. App. A), upon which we rely. Moreover, the evidence clearly established that the guns seized and confiscated were readily convertible into weapons which could fire and thus clearly were "firearms" within the meaning of the Act.

2. Petitioner also contends that the government should be estopped from demanding forfeiture on the ground that it first approved petitioner's prototype starter guns and then stood by from August 15, 1969, to November 6, 1969, knowing that petitioner's pistols were not in compliance with the law, while petitioner imported large quantities of them (Pet. 23). The contention was not advanced below and thus is not properly before the Court. *Lawn* v. *United*

States, 355 U.S. 339, 362-363, n. 16. In any event, the record is barren of any evidence that the government stood by, between August 15 and November 6, 1969, knowing petitioner was importing illegal guns, and affirmatively shows that petitioner had no reasonable basis to rely on the Division letters advising him that the hand-made prototype starter guns were not in violation of the Act.

The record does not show the alleged three-month delay by the government between notice to it of petitioner's illegal activity and notice to petitioner of his non-compliance with the Act. Although Agent Wessler knew on August 15, 1969, that the starter pistol he purchased from Mogel was convertible, did he not know that it was petitioner's import (I Tr. 126-127). So far as the record reveals the first notice to the government that the pistols stocked by Mogel came from petitioner occurred on October 8, 1969, when Mogel so informed Agent Rowley. By that time petitioner had already imported all the guns which are the subject of this forfeiture action, and within a matter of days thereafter was told by Mogel of Agent Rowley's suspicions.[3]

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[3] Agent Wessler sent the gun he purchased on August 15, 1969, to Washington and informed Agent Westenberger in Washington of its convertibility (I Tr. 1-28; 130). Westenberger was the agent who originally tested the prototypes (II Tr. 54-61). However, because petitioner did not raise the issue of estoppel below, Agent Westenberger was not asked whether he knew the gun he received from Agent Wessler to be one of the petitioner's, and, if so, when he received it and when he discovered its source.

Moreover, the record affirmatively shows that petitioner had no reasonable basis to rely on the Division letters informing him that the prototypes were not "firearms." The evidence clearly showed that the prototypes were significantly different from the manufactured guns and that the latter were readily capable of being converted into firearms. Moreover, prior to receipt of the Division letter as to the prototypes, petitioner had been advised by the manufacturer of the guns that the DA-4 model "should not be accepted by Washington offices as not difficult to drill and suitable to shoot." Petitioner never brought this letter to the attention of the Division or in any way notified it that the manufactured guns were different from the prototypes he had previously submitted. If petitioner had wished to get advance advice from the Division as to production line pistols he was well aware of how to do so. Thus, for the further reason that petitioner's alleged reliance on the prior government notification was unjustified, the estoppel claim must fail.[4]

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[4] Reasonable reliance is a necessary ingredient for estoppel. See *e.g.*, *United States* v. *Georgia-Pacific Co.*, 421 F. 2d 92 (C.A. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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